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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JUSTICE CHUKWA CHIMA,

Defendant and Appellant.

D060241

(Super. Ct. No. SCE308129)

APPEAL from a judgment of the Superior Court of San Diego County, William J. McGrath, Jr., Judge. Affirmed.

A jury convicted Justice Chukwa Chima of felony battery on transportation personnel with injury. (Pen. Code,¹ § 243.3.) Chima was granted probation subject to 365 days in local custody.

Chima appeals contending the evidence is insufficient to prove injury as required by statute, that the prosecutor committed misconduct during closing argument, and that

¹ All further statutory references are to the Penal Code unless otherwise specified.

the court erred in failing to determine Chima's ability to pay the booking fee imposed by the court. Although we will find the prosecutor acted improperly in including the term "wife beater" in her PowerPoint during argument, we will find such error harmless. We will reject the remaining contentions and affirm.

STATEMENT OF FACTS

The events in this case took place around 8:43 p.m. at the Lemon Grove trolley station in San Diego County. At that time the victim, Jeremiah Johnson, was on duty as a security officer for the transit authority. Johnson was wearing his uniform and badge. At that time Johnson contacted Chima to conduct a fare inspection. Chima said he had used his Compass card, which would allow him to travel for a month or portion thereof. Chima refused to take the card out of his wallet. Johnson told Chima he would not be able to use the trolley if he did not produce his card. Chima said "fine." Johnson told Chima to leave the station, but he refused.

Johnson called for assistance. The encounter then escalated. Chima refused to produce his identification, stood up with his hands in his pockets and ignored Johnson's direction to sit down and take his hands out of his pockets. Johnson, fearing Chima was reaching for a weapon, began to back up. Eventually Chima hit Johnson in the chest and a struggle ensued.

During the struggle that followed Johnson was pushed backward over a bench. He struck his head on the concrete platform. Chima came down on top of Johnson and the

struggle continued. Johnson sprayed Chima with pepper spray but that did not deter Chima.

Johnson was able to get out from under Chima and stand up. He called for backup while Chima continued to fight with him. Finally, a second officer arrived, and with considerable struggle, including repeatedly spraying Chima with pepper spray, Johnson and the other officer were able to subdue Chima. A search of Chima's wallet did not produce a Compass card.

Johnson sustained a lump and swelling to the back of his head as well as scratches and bruises. He was taken to a medical facility for treatment and examination. Johnson experienced swelling for about a week and was unable to continue work on the date of this incident.

Defense

Chima testified he did have a Compass card in his wallet. He was insulted by Johnson's demand that he again produce the card, which he had already scanned when he arrived at the station. He admitted giving Johnson a false name. Chima said he attempted to leave the station but Johnson grabbed hold of him. Chima pushed Johnson away and Johnson fell over a bench. Johnson then sprayed Chima with pepper spray and eventually Chima was arrested.

DISCUSSION

I

EVIDENCE OF INJURY REQUIRED BY SECTION 243.3

Chima contends there is insufficient evidence in the record to support the jury's finding that Johnson suffered an injury which required professional medical treatment. Thus, Chima argues the level of injury is insufficient for the felony offense for which he was convicted.

A. Standard of Review

When we consider a claim that there was insufficient evidence to support a jury verdict we review that claim under the well-known substantial evidence test. Under that test we review the entire record, drawing all reasonable inferences in favor of the jury verdict. We do not make credibility determinations nor do we attempt to weigh the evidence. We simply seek to determine whether there is sufficient substantial evidence from which a reasonable jury could find the defendant's guilt to be proved beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578; *People v. Lara* (1994) 30 Cal.App.4th 658, 665.)

Chima does not challenge the accuracy of the jury instruction which informed the jury of the nature of injury required to come within the statute. The court told the jury:

"An injury is any physical injury that requires professional medical treatment. The question of whether an injury requires such treatment cannot be answered simply by deciding whether or not a person saw it or received treatment. You may consider those facts, but you must

decide this question, based on the nature and extent and seriousness of the injury itself."

B. Analysis

Chima contends the injuries sustained by Johnson do not rise to the level required for this felony offense. He is mistaken. Johnson received cuts, bruises and swelling to his head. He was taken to a medical facility for examination and treatment. He was unable to work for the balance of the day of the incident and experienced swelling to his head for a week. The prosecution was not required to prove that bones were broken or that Johnson received a concussion. As the jury instruction correctly described, the prosecution had to show the victim suffered a "physical injury that requires professional medical treatment." That is precisely what was shown in this case.

In *People v. Longoria* (1995) 34 Cal.App.4th 12, 15-17, the court dealt with a similar definition of injury. There a police officer was kicked in the groin by the defendant and the officer suffered cuts and bruises to his hand. The officer was taken to a hospital where he was x-rayed and no broken bones were noted. The court in *Longoria* found the injuries sufficient to meet the statutory definition.

In *People v. Lara, supra*, 30 Cal.App.4th at pages 667 through 668, the court was again faced with evaluating injuries inflicted on an officer. In *Lara* the officer was taken to the hospital and the wounds were cleaned, but no other treatment was required. Again, the court found the injuries sufficient to meet the statutory definition.

In the present case, the officer was treated at a medical facility and had on-going symptoms as a result of Chima's attack. The evidence is sufficient to satisfy the statute and the definition in the jury instruction.

II

ANY PROSECUTORIAL ERROR WAS HARMLESS

Chima contends the prosecutor committed prejudicial misconduct when she presented her PowerPoint materials during closing argument. In presenting slides regarding credibility the prosecutor listed various factors as to why Johnson should be believed and Chima should not be believed. With regard to Chima, the slide described him as "convicted felon and wife beater." Although the slide was presented to the jury, the prosecutor did not verbalize the "wife beater" reference.

When the matter was brought to the trial court's attention the court found the reference inappropriate. The court believed it was more representative of character than it was of credibility. Chima had admitted a prior conviction for felony spousal abuse, but it was useable only on the issue of credibility. When the trial resumed, the court admonished the jury that the prior conviction could only be used for credibility and if the court had seen the reference to "wife beater," the court would have required it to be removed.

A. Legal Principles

A prosecutor violates the federal due process clause when he or she engages in misconduct which is significant enough to deny the defendant the right to a fair trial.

Prosecutorial misconduct occurs by California's standards when the prosecutor makes " 'use of deceptive or reprehensible methods to persuade either the court or the jury.' " (*People v. Cole* (2004) 33 Cal.4th 1158, 1202; *People v. Clair* (1992) 2 Cal.4th 629, 661; *People v. Adanandus* (2007) 157 Cal.App.4th 496, 512-513.)

B. Analysis

We do not hesitate to find the prosecutor's placement of the words "wife beater" in the PowerPoint slide to be improper. The prosecutor knew, or should have known that the phrase was inappropriate when discussing credibility based on the admission of a prior conviction. Having said that however, there is no demonstrable prejudice on this record. The reference was brief and contained only in the slide. The prosecutor did not verbally comment on the phrase, and while it was inappropriate, it is not a phrase so shocking that it might inflame or mislead the jurors. Finally, when the matter was brought to the trial court's attention the court gave a prompt and clear direction to the jury to disregard the comment and that the comment was improper. We are satisfied that any minimal prejudice that would have occurred as a result of the improper phrase, was eliminated by the prompt action of the trial court.

III

THE BOOKING FEE

Chima argues for the first time on appeal that the trial court erred in imposing a \$154 booking fee as a condition of probation. Chima claims the court failed to make a finding that Chima had the ability to pay such a fee. We find the issue has been forfeited

by failure to raise it in the trial court. In any event, the record clearly shows Chima has at least a \$2,000 per month income, which, in the absence of any other evidence clearly shows he can pay \$154 during his two-year probationary period.

Government Code section 29550.1, under which this fee was imposed, does not contain a specific requirement that the trial court must find the defendant's ability to pay. Ordinarily, in the absence of statutory direction to the contrary, a defendant who wishes to preserve a challenge to a fine or fee must first raise the issue in the trial court. (*People v. Crittle* (2007) 154 Cal.App.4th 368, 371; *People v. Hodges* (1999) 70 Cal.App.4th 1348, 1357.)

Chima relies on *People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1396 to support his claim the issue has not been waived. There the court, construing several different sections of the Penal Code and the Government Code, held the issue was not waived by failure to raise it in the trial court. In *Pacheco*, however, the court dealt with Government Code section 29550.2, which unlike the statute here, includes a specific requirement that the court find the defendant has the ability to pay the fee. To the extent the statutes are different, *Pacheco* is distinguishable from our case.

We note, however, that even though *Pacheco, supra*, 187 Cal.App.4th 1392, held the issue was not waived, the court held that ability to pay did not require an express determination by the trial court, but could be implied from the evidence. Here, as we have noted the record shows Chima has a monthly income of \$2,000. While he may have credit card debts and medical bills, there is nothing to show that he cannot come up with

\$154 over the two-year period of his probation. Even if the issue of ability to pay has not been waived, we are satisfied the record supports an implied finding that Chima can pay the booking fee.

DISPOSITION

The judgment is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

HALLER, J.

AARON, J.